FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD J. TRUMP, *et al.*,

Appellants,

—v.—

RODERICK CHU, Individually and as Commissioner of The New York State Tax Commission,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE REAL ESTATE BOARD OF NEW YORK, INC., *AMICUS CURIAE*, IN SUPPORT OF JURISDICTIONAL STATEMENT

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PRELIMINARY STATEMENT

This brief is submitted, pursuant to Rule 36 of the Rules of this Court, on behalf of The Real Estate Board of New York, Inc. ("REBNY"), *amicus curiae*, in support of the position of the appellants to the extent that they seek (1) to have the Court note probable jurisdiction of this appeal and (2) a reversal of a judgment of the New York Court of Appeals upholding, as constitutional, Article 31-B of the New York State Tax Law,

enacted on March 28, 1983, which imposed a ten percent tax (the "Ten Percent Tax") on the proceeds derived from certain transfers of real property located within New York State. Tax Law § 1441. (App. A., page 25a.)[1]

QUESTION PRESENTED

Whether the Ten Percent Tax, the applicability of which is dependent on the amount of gross receipts derived from a transfer of real property, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

INTEREST OF THE *AMICUS*

REBNY is a trade association which exists to represent and further the interests of the participants in the New York City real estate market. REBNY's membership consists of over four thousand property owners, developers, brokers, managers, attorneys, architects, insurance companies, banks, utilities, quasi-public agencies, title companies, appraisers, consultants and other institutions and individuals professionally interested in Manhattan real estate.

Originally organized in 1896, REBNY is comprised of four divisions which devote their energies to particular aspects of the real estate business affecting its members. One of these divisions, the Owners and Builders Division, is further divided into committees focusing on, among other things, legislation and taxes. This Division's members are deeply involved in every area of public policy touching on the construction process and receive frequent advisories on pertinent laws and regulations. Another division, the Allied and Associates Division, was organized to reflect the wide interests of New York's business community with a special emphasis on tax policy.

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1 References thus: "(App. __, page __)" are to the Appendix accompanying the appellants' Jurisdictional Statement.

Thus, REBNY represents the interests of all facets of the real estate industry in the locale where the impact of the Ten Percent Tax is undeniably greatest—New York City. Indeed, it appears that the New York legislature, in making the Ten Percent Tax applicable to condominium and cooperative developments where the aggregate consideration to the developer for the sale of a entire development equals or exceeds one million dollars while exempting from the Tax similar transactions involving the development of subdivided parcels of land with improved residences, intended that the burden of the Ten Percent Tax should fall most heavily upon the New York City real estate market, where a significant amount of condominium and cooperative development takes place.

Accordingly, REBNY agrees with the appellants' position on this appeal and submits this *amicus* brief because it believes that the Ten Percent Tax discriminates against identically situated taxpayers on the basis of varying levels of gross receipts derived from the transfer of real property, in violation of the Equal Protection Clause of the Fourteenth Amendment.

THE QUESTION IS SUBSTANTIAL

A. Introduction.

Prior to March 31, 1983, the real estate business in New York State was able to be conducted in an expeditious and efficient manner. Its participants were able to structure transactions in ways creative enough to meet the rapidly changing needs of the people who lived here and the businesses which were located here because governmental intervention, while not non-existent, was sufficiently non-interferent to afford the real estate industry the flexibility necessary to compete in the real estate market and provide the residential and commercial space needed for a healthy economy.

On March 31, 1983, with the enactment of the Ten Percent Tax, all that changed. In enacting the Ten Percent Tax as part of a larger revenue-raising package requested by the executive

branch of the government, the Legislature injected itself into real estate transactions to such a great extent as to remove much of the flexibility which the industry had previously enjoyed. As shown below, because of the enactment of the Ten Percent Tax, no longer can many real estate transactions be structured to include purchase money debt in order for them to be consummated free of the additional costs, constraints and uncertainties of traditional institutional financing. Similarly, no longer can an entrepreneur readily sell one piece of property at a loss in the hope that the loss will be offset by gains realized in future transactions. No longer, moreover, can an individual who owns property with others as tenants in common join his co-owners in a sale of the property free of the Ten Percent Tax, regardless of how small his share may be. In addition, no longer can an individual of modest means agree to purchase a condominium or cooperative apartment confident that when he has paid the purchase price of his apartment, his obligations in connection with the purchase will be satisfied. No longer, indeed, can almost any significant real estate transaction be consummated on an immediate basis, even if the seller, purchaser and lender all agree that it should be.

Simply put, the Ten Percent Tax has transformed what previously was an industry with the flexibility needed to be responsive to the ever changing needs of a fast-paced marketplace into an industry in which governmental intervention, with all its attendent delays and confusion, is the rule. Since there is very little legislative history to explain what the Legislature hoped to accomplish in passing the Ten Percent Tax, we cannot speculate on the ends it had in mind. What is apparent, however, is that the Legislature, in enacting the Ten Percent Tax, allowed its desire to raise revenues for New York State to cause it to draft legislation which has burdened every aspect of transactions in real estate and changed completely the manner in which they are carried out. This ill-considered legislation has created artificial market forces favoring some taxpayers over others identically situated. Inevitably, all who are subject to the Ten Percent Tax have a strong incentive to

counter these artificial market forces by artificially structuring future transactions so as to avail themselves of loopholes. The obvious consequence is that the industry and marketplace suffer by reason of the artifice.

Thus, while REBNY agrees with appellants that the Ten Percent Tax is unconstitutional (1) in that it discriminates against taxpayers situated similarly on the basis of whether the proceeds of a transfer equal or exceed $1 million or whether they are transferring condominium or cooperative apartments as opposed to subdivided parcels of land with improved residences thereon, and (2) in that it is drafted in such a way as to tax gross receipts rather than gains, REBNY also wishes to demonstrate to the Court how pervasive the impact of the Ten Percent Tax is and how su' tantial the constitutional question raised by appellants is. What follows, therefore, is a summary of the more onerous provisions of the Ten Percent Tax. Thereafter, we address the constitutional issues raised in the court below.

B. Impact Of The Ten Percent Tax.

As appellants observe in the Jurisdictional Statement (page 7), the Ten Percent Tax has imposed an extremely onerous financial burden upon the New York real estate industry, having drained upwards of $300 million from the industry in each year since its enactment in March 1983. It goes without saying that every dollar required to be paid to the State of New York under the Ten Percent Tax equates to a dollar taken out of the mainstream of capital for future transactions which stimulate activity in an industry vital to the economic viability of the State of New York. In quantitative terms alone, therefore, the validity of the Ten Percent Tax is a question of enormous significance.

There is more. Although the courts below analyzed the Ten Percent Tax primarily in terms of the disparate impact created by the $1 million threshhold, a reading of Article 31-B of the Tax Law reveals that the impact of the Ten Percent Tax is far

more pervasive than simply imposing a levy on transfers of property for consideration of $1 million or more, while exempting entirely transactions for lesser consideration even though they might generate enormous gains. Some of the other ways in which the Ten Percent tax impacts on the real estate industry are summarized below.

1. One particularly burdensome aspect of the Ten Percent Tax is that it discourages sales involving purchase money mortgages, which traditionally have been vital to a multitude of real estate transactions. This is so because, although the Tax Law (§ 1442; App. D., page 25a) permits the deferral of a portion of the Ten Percent Tax if not all the consideration is paid in cash at the time of the transfer, the timetable for payment of the remainder of the Tax is dictated by statute and is not dependent upon the payment schedule provided for in the instrument of indebtedness.[2] Particularly where the transferor accepts partial payment in the form of a *long term* purchase money mortgage, therefore, the Ten Percent Tax must be paid in full years before the consideration giving rise to the Tax is received. This produces an incongruous result. In addition, the statute makes no provision for the transferor to receive a deduction or refund if the full amount of the purchase money indebtedness is not ultimately paid. Thus, the Ten Percent Tax has a significant adverse impact on real estate transactions throughout New York because it discourages property owners from voluntarily entering into any transaction where the entire consideration is not payable at the time the transaction is consummated. Stated another way, the statute frustrates the consummation of any transaction in which purchase money financing is an essential ingredient.

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2 Where a transferor holding a purchase money mortgage elects to defer payment of a portion of the Ten Percent Tax (which is both prudent and necessary where there is a deferral by the transferee of the payment of the purchase price), he must, regardless of the repayment terms of the mortgage, make an initial Tax payment in an amount dictated by statute and pay the balance of the Tax due in equal annual installments of at least ten percent of the balance. Tax Law § 1442. (App. D., page 25a.)

2. The impact of the Ten Percent Tax is not limited to the transferor. The transferee, being in effect secondarily liable for the Ten Percent Tax (Tax Law § 1447(3); App. D., pages 31a-33a), has an obvious interest in ensuring that the Tax has been paid. Although the need for a transferee to ensure that payment has been made in individual transactions for $1 million or more may be clear, the purchaser of a cooperative or condominium unit for less than $1 million may become liable for the Ten Percent Tax without even being aware that the Tax is applicable to the apartment he is purchasing. For example, an individual who purchased the stock allocated to a cooperative unit for $150,000 in a building having an aggregate sale price of $1 million or more would be secondarily liable for a proportionate share of the Ten Percent Tax if any gain were realized on the building as a whole. Although the statute (§ 1447(3)(a); App. D., pages 31a-32a) gives the Department of Taxation and Finance a first priority on any sums the transferee is required to pay the transferor where the Ten Percent Tax is unpaid, it affords the transferee no protection if the entire purchase price is paid to the transferor before the transferee learns that there is Tax due. In our example, therefore, if the innocent purchaser paid for his apartment in full before discovering that the Ten Percent Tax was applicable and had not been paid, the purchaser would be liable for the Tax himself and would be relegated to suing the transferor to recover any Tax payments he was required to make.

3. The Ten Percent Tax also discriminates against mortgage holders in transactions involving the cancellation of indebtedness. Section 1440(1) of Article 31-B (App. D., page 22a) provides that for the purpose of determining whether the Ten Percent Tax is applicable, the term "[c]onsideration includes the cancellation or discharge of an indebtedness or obligation. . . ." Thus, if a mortgage lender faced with a default in a sum exceeding the borrower's basis in the mortgaged property (a likely occurrence where a borrower has refinanced his purchase of property) accepts a deed in lieu of instituting foreclosure proceedings, the resulting transfer will

be subject to the Ten Percent Tax if the amount of the debt being discharged equals or exceeds $1 million. Assuming, as is likely, that the defaulting borrower is unable to pay the Ten Percent Tax resulting from the transfer, the obligation to pay the Tax will fall upon the lender, even though the lender is forgiving a debt by accepting a deed to property purchased for less than the amount of the debt. To avoid this, an aggrieved mortgagee must, as a practical matter, resort to foreclosure proceedings to collect the unpaid debt in any case where the debt exceeds the borrower's basis and the mortgagee has any doubts concerning the ability of the borrower to pay the Ten Percent Tax. Accordingly, the Ten Percent Tax has the effect of encouraging costly, protracted litigation and discouraging the settlement of disputes involving mortgage defaults.

4. Another significant burden created by The Ten Percent Tax is its discriminatory effect on taxpayers who earn their livelihoods by buying and selling real property. Since the Ten Percent Tax is applied on a transaction-by-transaction basis, taxpayers are precluded from offsetting gains realized in particular transactions by losses incurred in others, even though they can do so for income tax purposes. Thus, a taxpayer may be required to pay substantial sums of money pursuant to the Ten Percent Tax even though he incurs a net loss on his real property transfers over the course of a year.

5. The Ten Percent Tax also discriminates against persons who own real property as tenants in common. For example, if property owned by two individuals as tenants in common, each owning an undivided fifty percent interest, were sold for $1 million, each co-tenant's interest would be subject to the Ten Percent Tax even though his individual interest was worth, and he received, only $500,000. Thus, an interest which would otherwise be exempt from the Ten Percent Tax is taxable if it is sold together with other interests in property held in common ownership for a price equalling or exceeding $1 million.

6. The Ten Percent Tax has a substantial impact on the New York real estate industry as a whole. Because the Ten Percent Tax requires that all transactions subject to it be scrutinized by

the Department of Taxation and Finance before a deed can be recorded, it is critical that all necessary documents be prepared and filed at least twenty days before a transfer is to take place. (Tax Law § 1147(2); App. D, page 31a.) Merely by virtue of its existence, therefore, the Ten Percent Tax imposes a substantial impediment to the expeditious consummation of transfers of real property and, as a result, severely undermines the flexibility of New York's real estate industry.

7. Finally, by virtue of its very existence, the Ten Percent Tax has a detrimental effect upon the efficacy of conducting real estate transactions within the State of New York. While we cannot know with certainty how many transactions have not taken place because of the discriminatory impact of the Ten Percent Tax, reason compels the conclusion that the number is substantial because such transactions are clearly less attractive due to the Tax. Moreover, unexploited opportunities for real estate development preclude real estate tax assessors from considering the selling prices of properties in making their assessments. Particularly when the market is strong, foregone sales deny to assessors one of their most vital tools in assessing taxes and prevent real estate taxes from rising to their full potential. Thus, the Ten Percent Tax, to the extent it has a chilling effect on development, has an adverse effect on the amount of revenues available for such purposes as educating the State's schoolchildren.

In short, the Ten Percent Tax has a pervasive impact on every aspect of transactions involving the transfer of real property for consideration of $1 million or more, not because such transactions are inherently complicated but, rather, because the New York Legislature has arbitrarily determined that such transactions should be burdened by an onerous tax and onerous administrative procedures. Since the Ten Percent Tax has imposed enormous burdens on the New York real estate industry, in both quantitative and qualitative terms, this Court should note probable jurisdiction, and, since the Tax is arbitrary and discriminatory, the Court should set it aside on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment.

C. Applicable Constitutional Principles.

As the dissenting judge in the court below correctly observed, "in order for a tax classification to be rational, not arbitrary, the classes must be so defined that those in similar circumstances are treated with approximate equality." (App. A., page 9a.)[3] This view of the requirements of equal protection comports with Supreme Court precedent. As this Court has stated, a legislature's power to classify is not unlimited:

> [T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37; *AirWay Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959). We submit that the majority in the court below, in holding that the Ten Percent Tax is constitutional, effectively turned its back on this time-honored principle.

Before addressing itself to the constitutionality of the Ten Percent Tax, the court below stated that " 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . .' " (App. A., page 4a) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)); *see also Allied Stores of Ohio, Inc. v. Bowers*, *supra*, 358 U.S. 522, 527-28. The court below then hypothesized two bases on which, in its view, the New York Legislature might

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3 We note that while the opinion of the court below was not yet officially reported at the time appellants filed the Jurisdictional Statement, the opinion has since been reported, at 65 N.Y.2d 20 (1985).

justifiably have enacted the Ten Percent Tax. First, the Legislature might reasonably have believed, according to the court below, that " 'generally speaking' " the gross profits of real estate transactions increase as the amounts of gross consideration increase. (App. A., page 7a) (quoting *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 559 (1935).) In reaching this conclusion, the court suggested that it was "conceivable" that the Legislature viewed taxing smaller transactions as "economically inefficient and counterproductive. . . ." (App. A., page 7a.) Second, the court speculated that the Ten Percent Tax might have been enacted so as to tax transactions for consideration of $1 million or more based on considerations of "administrative convenience." (*Id.*) In the court's view, either rationale would be sufficient to uphold the Ten Percent Tax on constitutional grounds.

The court below did not base its holding on any legislative history and, moreover, did not provide any support for the view that the classification resulting from the Ten Percent Tax treats taxpayers selling real property for $1 million or more and taxpayers selling real property for less than $1 million with "approximate equality." Indeed, the court, while paying lip service to sound arguments demonstrating that the Ten Percent Tax accords widely varying treatment to taxpayers situated similarly (App. A., at 3a-4a), declared that the Ten Percent Tax is constitutional without responding to those arguments. We submit that the court below erred and that the Ten Percent Tax is unconstitutional under the principles set forth in *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935).

In *Stewart Dry Goods*, the plaintiffs challenged as unconstitutional a Kentucky statute which imposed a tax on retail merchants on the basis of their gross receipts. The tax at issue amounted to one-twentieth of one percent on a retail merchant's first $400,000 in gross receipts and, in the case of merchants having gross receipts of more than $400,000, gradually rose to one percent. Like the Ten Percent Tax, the Kentucky gross receipts tax was defended as "essentially a revenue measure." *Id.* at 555. Similarly, the trial court in

Stewart Dry Goods found what the court below effectively held here, to wit, that the greater a merchant's gross receipts were, the greater its profits were likely to be. *Id.* at 558.

Nevertheless, this Court found the Kentucky statute unconstitutional. Noting that it was "not concluded by the name or description of the tax as found in the act," *id.* at 555, the Court struck down the tax because, despite its characterization as a revenue measure, it bore no relation to the amount of profits realized by retail merchants. Quoting from its earlier opinion in *United States Glue Company v. Town of Oak Creek*, 247 U.S. 321, 328-29 (1918), the Court stated:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between the profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

294 U.S. at 558.

The Court then turned its attention to the argument that the difficulty of conditioning the amount of tax payable on the amount of profits realized justified imposing a tax arbitrarily on the basis of receipts. After noting that there could be no "finding that the relation between gross sales and net profits, or increase of net worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance," *id.* at 559, the Court rejected the notion that considerations of convenience could justify the tax, stating:

> We are told that the gross sales tax in question is in truth a rough and ready method of taxing gains under the guise of taxing sales; that it is less complicated and more convenient of administration than an income tax; and Kentucky for these reasons is at liberty to choose this form, and to ignore the consequent inequalities of burden in the interest of ease of administration. The argument is in essence that it is difficult to be just, and easy to be arbitrary. If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost. Gross inequalities may not be ignored for the sake of ease of collection.

Id. at 559-60. The Court then suggested that if Kentucky had truly wished to make its tax dependent on the magnitude of a merchant's business, it could have accomplished that goal by enacting an "income levy." *Id.* at 560. The Court concluded:

> The Kentucky statute ignores the form of organization and the method of conductng business. The taxable class is retail merchants, whether individuals, partnerships or corporations; those who sell in one store or many; those who offer but one sort of goods and those who through departments deal in many lines of merchandise. The law arbitrarily classifies these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed. It exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other. We hold the act unconstitutional, and reverse the judgment.

Id. at 565-66.

We submit that the Ten Percent Tax at issue here suffers from the same infirmities as the gross receipts tax at issue in *Stewart Dry Goods*. While the Ten Percent Tax was upheld by

the court below on the basis that the Legislature could justifiably have assumed that large real estate transactions are generally more profitable than small transactions, absolutely no proof was offered to justify this conclusion. In fact, the very example discussed by the majority in the court below shows that such an assumption, even if it had actually been made, would have been unfounded. As the court below stated (App. A., pages 3a-4a):

> [T]hey [plaintiffs] assert that by exempting transfers for less than one million dollars the . . . [Ten Percent Tax] treats identically situated taxpayers differently on the basis of varying levels of gross receipts, e.g., a taxpayer who sells his property for $999,999 and has a gain of $500,000 owes no tax whereas a taxpayer who sells his property for $1,000,001 and has a similar $500,000 gain must pay a tax of $50,000 . . . .

As in *Stewart Dry Goods*, therefore, no support was furnished, nor does any support exist, for the proposition that the Legislature, in enacting the Ten Percent Tax, made any attempt to accord similar treatment to taxpayers situated similarly. As the court below conceded, almost glibly, the taxpayer who realizes a $500,000 gain on a $999,999 transaction pays no tax while a taxpayer who realizes a $500,000 on a transaction in the amount of just *two dollars more* pays $50,000 in tax. A more blatant instance of unequal treatment of taxpayers who are similarly situated can scarcely be imagined.

It is also important to emphasize that in at least one respect the Ten Percent Tax is *more* arbitrary and discriminatory than the gross receipts tax found to be unconditional in *Stewart Dry Goods*. This is so because the tax at issue in *Stewart Dry Goods* was graduated; while a merchant having gross receipts of more than $400,000 was saddled with tax at a higher percentage rate than a merchant having gross receipts of less than $400,000, both merchants were subject to the same percentage tax rate on the first $400,000 of gross receipts.

Here, in contrast, the Ten Percent Tax does not apply at all to transfers for consideration of less than $1 million, but applies to transactions meeting the $1 million threshold from "dollar one." As discriminatory as the gross receipts tax at issue in *Stewart Dry Goods* was, therefore, the Ten Percent Tax is even more discriminatory.

In an effort to distinguish the Ten Percent Tax from the gross receipts tax found to be unconstitutional in *Stewart Dry Goods*, the appellee argued before the court below that (1) the Ten Percent Tax is, by its terms, a tax on gains as opposed to gross receipts; (2) a taxpayer owes no tax for a transfer of real property unless a gain is realized; (3) the amount of tax due on any gain is measured by the amount of the gain; and (4) the only exception to the rule is that transfers of real property for consideration of less than $1 million are not taxed at all.

We submit that appellee and the court below missed the mark. For one thing, the lesson of *Stewart Dry Goods* is not that gross receipts taxes are necessarily bad or that "gains" taxes are necessarily good; indeed, the Court began its discussion by noting that the label put on a tax by the legislature is not dispositive. 294 U.S. at 555. Rather, the lesson of *Stewart Dry Goods* is that the Constitution abhors labels such as "gains" taxes where, as here, they result in widely varying treatment of taxpayers situated similarly. Just as it was improper for the Kentucky legislature to enact a tax on the assumption that "generally speaking" merchants' profits increase as their receipts increase, so too it was improper for the New York Legislature to assume, in the face of uncontradicted proof to the contrary, "that 'generally speaking' profits increase as the amount of gross consideration received increases. . . ." (App. A., page 7a.) As appellants demonstrated, there was no basis for the Legislature to assume that profits ever increase with consideration, much less generally. Simply put, the Ten Percent Tax is, even under the rationales posited by the court below, arbitrary and discriminatory.

Appellee's characterization of the Ten Percent Tax as a tax on gains is disingenuous for other reasons as well. Thus, as the

dissent in the court below observed (App. A., pages 11a-12a), certain "soft costs" associated with the acquisition and sale of property are excluded from the definition of "original purchase price" contained in the statute (Tax Law § 1440(3); App. D, pages 23a-24a) and, therefore, are excluded from the determination of gain. Although the harshness of this exclusion has been ameliorated somewhat by regulation, "soft costs" related to selling real property, including costs incurred in advertising, public relations and marketing, and field office expenses, maintenance expenses, business taxes and warranty costs, still are excluded from the definition of "original purchase price." (App. A., page 12a.) An entire category of real and necessary costs, which plainly would serve to increase "original purchase price" and thereby reduce, or potentially eliminate entirely, a gain, is excluded from the calculation of gain. Therefore, even if the Court accepts appellee's attempt to distinguish the tax in *Stewart Dry Goods* from the Ten Percent Tax on the basis that the Ten Percent Tax applies to gains, it is clear that the Ten Percent Tax does not attach simply to gains but, rather, to the gross receipts of transfers, by virtue of the very expansive definition of "gain" enacted by the Legislature. We submit that the Legislature may not escape the effect of the principles articulated in *Stewart Dry Goods* simply by defining the elements entering into the calculation of "gain" so as to give the Ten Percent Tax the superficial appearance of validity.

The Ten Percent Tax is also arbitrary in that it applies to the sales, for less than $1 million, of condominiums and cooperatives in buildings where the aggregate consideration equals or exceeds $1 million, while exempting from the Tax analogous transactions involving subdivided parcels of land with improved residences thereon. Thus, for example, if a developer converted an apartment complex containing two hundred apartments to condominium ownership and sold each apartment for $50,000, he would be required to pay the Ten Percent Tax. If the same developer, however, subdivided a large estate tract in the same town into two hundred smaller lots, built houses on the lots and sold them for $50,000 each, he would pay no tax. Although either venture would result in considera-

tion to the developer in the sum of $10 million, the developer would be subject to the Ten Percent Tax if he sold two hundred apartments for $50,000 each and exempt from the Tax if he sold two hundred homes for the same price.[4] In distinguishing sales of condominiums and cooperatives from sales of subdivided parcels of realty with improved residences, therefore, the legislature has made an already arbitrary and discriminatory tax measure more arbitrary and discriminatory.

In short, the Ten Percent Tax is no more defensible as a rational and convenient method of taxing gains than was the gross receipts tax found to be unconstitutional in *Stewart Dry Goods*. As shown above, the Ten Percent Tax accords widely varying and disparate treatment to taxpayers who realize identical gains on their respective transfers of real property because the tax is applicable, if at all, only if the gross receipts of the transfer equal or exceed $1 million. Even where this threshhold is surpassed, moreover, the Ten Percent Tax attaches to gross receipts, and not merely to gain, because the "soft costs" incurred by the transferor, while real and necessary, may not be added to the transferor's basis and, therefore, result in a gain which does not truly reflect the amount of money left to a transferor after subtracting his costs from his receipts. Finally, the Ten Percent Tax discriminates against condominium and cooperative developers, because it requires that the selling prices of all the units within a building be aggregated for the purpose of determining whether the $1 million threshhold has been met, while not requiring any aggregation of the prices of

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4 While the court below offered four hypothetical bases to rationalize this distinction (App. A., page 8a), each basis offered has been negated by appellants. (*See* Jurisdictional Statement, pages 13-17.) We note, moreover, that while the majority attempted to rationalize the disparate treatment of taxpayers selling condominiums and cooperatives on the basis that the Legislature might have wished to protect rental tenants and individual homeowners of limited means (App. A., Page 8a), this "rationale" fails upon analysis. In the example discussed above, for instance, the developer would not be subject to the Ten Percent Tax even if, instead of selling the houses for $50,000 each, he sold them for $500,000 each.

subdivided parcels of real property with improved residences. Since the discriminatory effect of the Ten Percent Tax could have been mitigated, if not negated, by "enact[ing] a 10% capital gain surcharge on every taxable transfer of real property in the State" (App. D., page 10a), it is plain that the rationales offered by the majority in the court below to uphold the Ten Percent Tax—the assumption that profits increase with price and considerations of administrative convenience—were entirely unjustified. In these circumstances, we submit that the Ten Percent Tax violates the Equal Protection Clause of the Fourteenth Amendment and should, therefore, be set aside.

D. Subsequent Opinions Adopting *Stewart Dry Goods.*

There can be no doubt that the principles set down in *Stewart Dry Goods* remain valid, at both the state and federal level. This Court, for example, relied upon it during the following Term in striking down a similar gross receipts tax in *Valentine v. Great Atlantic & Pacific Tea Co.*, 299 U.S. 32 (1936). The principles articulated in *Stewart Dry Goods* have also been applied by several state courts. *See Merit Oil of New York, Inc. v. New York State Tax Commission*, 111 Misc. 2d 118, 443 N.Y.S.2d 604 (Sup. Ct. Albany Co. 1981); *Kalian v. Langton*, 96 R.I. 367, 192 A.2d 12 (1963); *Pabst v. Commissioner of Taxes*, 136 Vt. 126, 388 A.2d 1181, *appeal dismissed*, 439 U.S. 922 (1978). Indeed, while the *Stewart Dry Goods* opinion was rendered fifty years ago, its validity has never been questioned by this Court.

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In summary, the Ten Percent Tax is unconstitutional because its arbitrary $1 million threshhold has the effect of treating similarly situated taxpayers differently from one another and because the statutory definition of the elements considered in determining whether a gain has been realized on a given transfer result in the taxation of the gross receipts of a transfer. Since the rationales advanced by the court below in upholding the Ten Percent Tax are demonstrably incapable of withstand-

ing analysis, and inasmuch as the constitutionality of the Ten Percent Tax poses questions of enormous significance to the New York real estate industry, we submit that the Court should note probable jurisdiction and reverse the judgment below on the ground that the Ten Percent Tax violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For all the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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DATED: September 1985